

**Before the
Federal Communications Commission
Washington, D.C. 20054**

In the Matter of)	
)	
Inquiry Concerning High-Speed Access to)	GN Docket No. 00-185
the Internet Over Cable and Other Facilities)	
)	
Internet Over Cable Declaratory Ruling)	
)	
Appropriate Regulatory Treatment for)	CS Docket No. 02-52
Broadband Access to the Internet Over)	
Cable Facilities)	
)	

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

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Executive Summary

The National Association of Broadcaster (“NAB”) submits these reply comments in the FCC’s proceeding seeking comment on whether and, if so, how high speed Internet access provided over cable modems should be regulated under the Communications Act of 1934. NAB emphasizes that the Commission’s failure to adopt nondiscrimination safeguards will inevitably produce a broadband marketplace characterized by minimal competition, a lack of innovation, and severely restricted consumer choice.

Regardless of the regulatory label placed on the provision of high speed Internet access over cable modems, NAB urges the Commission not to lose sight of the important underlying policy goal – how to ensure that consumers have meaningful choices among competing service and content providers in the broadband environment. Because no commenter in this proceeding presented a convincing rationale for departing from the regulatory principles of openness and nondiscrimination that have kept the narrowband Internet marketplace competitive, accessible and devoid of entry barriers, the Commission should adopt similar policies in the broadband environment to ensure that consumers have nondiscriminatory access to the broadband service and content providers of their choice, rather than just the broadband services favored by the owners of bottleneck distribution platforms.

History has shown that, in the absence of nondiscrimination requirements, platform owners (whether cable operators or telephone companies) inevitably control access to consumers so as to minimize competition. Certainly Congress, the Commission, the courts, industry observers and commenters in this proceeding have all recognized that the owners of cable platforms have acted in the past and continue to act

today to control access to consumers, discriminate against unaffiliated service and content providers, and inhibit competition in both the analog and digital environments. Because cable operators own the distribution platforms that service and content providers need to reach consumers, they can easily leverage this bottleneck control over transmission facilities into control of downstream markets, including the provision of various broadband services such as interactive television. Content providers such as broadcasters are particularly concerned about the clear ability and incentive of cable operators with affiliated Internet service providers to engage in content-based discrimination of Internet content. The failure of the Commission to adopt safeguards to prevent the owners of bottleneck facilities from blocking or encumbering the access of unaffiliated service and content providers to consumers will clearly inhibit competition, innovation and consumer choice, and will also produce an uncompetitive broadband marketplace dominated by one, or at best two, gatekeeper platform owners. The antitrust authorities and the courts have previously found duopolies to be uncompetitive and inefficient, and NAB agrees with those commenters who explained that a broadband marketplace dominated by cable and telephone company platform owners would not produce vigorous price competition, service innovation or consumer choice.

The Commission should not, moreover, be deterred from adopting nondiscrimination policies in the broadband environment by the overly familiar, unmeritorious claims of the owners of bottleneck cable facilities that any type of regulation applicable to them would discourage investment in upgraded distribution facilities and automatically raise serious constitutional concerns. Preventing cable operators from discriminating against unaffiliated broadband services and content will

not eviscerate the economic incentives that cable operators have to invest in broadband facilities so as to be able to offer a wide array of remunerative services, including digital video, pay-per-view services, video-on-demand, and telephony, as well as cable modem services. In fact, rather than decreasing investment in broadband services and content, the adoption of nondiscrimination standards should actually *increase* such investment, as unaffiliated service and content providers will be more inclined to develop new and innovative services if they are assured of being able to reach consumers without disruption or discrimination by cable gatekeepers.

Claims that a nondiscriminatory access obligation imposed on providers of cable modem service would constitute a taking without just compensation in violation of the Fifth Amendment border on the frivolous for several reasons. Even if it could be maintained that a nondiscriminatory access obligation would result in a taking under relevant Supreme Court precedent (which it cannot), no constitutional issue would arise because, under a nondiscriminatory access regulation, cable owners would be compensated for the use of their systems' capacity. Assertions that a nondiscriminatory access requirement would violate the First Amendment rights of cable platform owners must also be rejected. The cable industry has a long history of reflexively contending that virtually *any* regulation affecting it has serious First Amendment implications. It also seems clear that a policy of nondiscriminatory access would have less impact on the speech and speech-related interests of cable operators than the broadcast must carry rules previously upheld by the Supreme Court.

For all these reasons, NAB urges the Commission to prevent the owners of bottleneck distribution facilities from exercising their control of the essential pathway

into consumers' homes so as to silence the voice of competing speakers in the broadband marketplace. The Commission should therefore retain the regulatory policies that have been consistently applied in the narrowband Internet marketplace, and apply those nondiscrimination requirements to high speed Internet access services provided over cable modems.

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To: The Commission

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters (“NAB”)¹ submits this reply to certain comments on the Commission’s *Notice of Proposed Rulemaking* in this proceeding.² In the *Notice*, the Commission sought comment on the scope of its jurisdiction to regulate cable modem service and whether (and, if so, how) cable modem service should be regulated under the law. Comments were submitted in response to this *Notice* by numerous localities, state regulatory bodies, Internet service providers, cable operators, telephone companies, trade associations and consumer groups, and they expressed a wide range of opinions on the Commission’s proposals.

¹ NAB is a nonprofit incorporated association of radio and television stations and broadcast networks. NAB serves and represents the American broadcasting industry.

² *Declaratory Ruling and Notice of Proposed Rulemaking* in GN Docket No. 00-185 and CS Docket No. 02-52, FCC 02-77 (rel. March 15, 2002) (“*Notice*”). In the *Declaratory Ruling*, the Commission concluded that high speed Internet access provided over cable modems should be classified as an interstate information service under Title I of the Communications Act of 1934 (“the Act”).

In this reply, NAB agrees with the many commenters who concluded that cable operators, as the owners of bottleneck transmission facilities, have both the ability and the incentive to discriminate against unaffiliated service and content providers that depend upon the platform owners' facilities for access to consumers. Regardless of the regulatory label placed on the provision of high speed Internet access over cable modems, NAB accordingly urges the Commission not to lose sight of the underlying policy goal – how to ensure that consumers have meaningful choices among competing service and content providers in the broadband environment. Safeguards preventing the owners of bottleneck facilities from unreasonably encumbering the ability of unaffiliated service and content providers to reach consumers have clearly promoted competition, innovation and choice in the narrowband environment, and departing from these regulatory principles would almost inevitably produce an uncompetitive broadband marketplace dominated by one, or at best two, gatekeeper platform owners. The Commission should not, moreover, be deterred from adopting nondiscrimination policies in the broadband environment by the overly familiar, unmeritorious claims of the owners of bottleneck cable facilities that any type of regulation applicable to them would discourage investment in upgraded distribution facilities and automatically raise serious constitutional concerns.

I. Whatever The Regulatory Classification Placed On Cable Modem Service, The Commission Must Ensure That Consumers Have Unencumbered Choices Among Competing Broadband Service And Content Providers.

The Commission has concluded that high speed Internet access provided over cable modems should be classified as an information service under Title I of the Act. Many commenters disagreed with this ruling³, and a number of parties have challenged the decision in

³ See, e.g., Comments of Association of Communications Enterprises (“ACE”) at 2; People of the State of California and California Public Utilities Commission (“California”) at 1-3; American

court. NAB will refrain from adding to the extensive debate about the regulatory label that should properly attach to cable modem service, but will focus primarily on the underlying policy goal in this proceeding – how to ensure that consumers have meaningful choices among competing service and content providers in the broadband environment. Although the classification placed on cable modem service will undoubtedly have real regulatory consequences, NAB also notes that, regardless of the regulatory label attached to this service, the Commission has the flexibility to adopt the safeguards needed so that consumers may freely choose among the offerings of competing broadband service and content providers.⁴ As the representative of content providers, NAB particularly stresses the importance of ensuring that the owners of bottleneck transmission facilities do not discriminate against unaffiliated service and content providers, especially by unreasonably encumbering their ability to reach consumers.

II. The Development Of Narrowband Internet Demonstrates The Importance Of Nondiscriminatory Access.

Virtually all observers agree that narrowband Internet has flourished because of its “openness.”⁵ Specifically, the narrowband Internet has an “end-to-end” architecture that

Civil Liberties Union (“ACLU”) at 2; The City Coalition at 7-8; Consumer Federation of America, *et al.* (“CFA”) at 3-7.

⁴ See *Notice* at ¶¶ 77-78 (given the FCC’s classification of cable modem service as an information service, Commission sought comment on the extent to which it should exercise its Title I authority to regulate such service).

⁵ See, e.g., *Trying to Connect You*, *The Economist* at 69 (June 24, 2000) (article observed that the “success of the Internet has shown the value of open standards and a neutral platform on which everybody can compete on equal terms. Had the Internet been dominated by any one company, it would not be where it is today.”); *No Chokeholds Allowed*, *Los Angeles Times*, Metro Section (Sept. 22, 2000) (editorial commented that “openness” has been the “key” to the Internet’s success and that it “should stay that way”); Jerome H. Saltzer, “*Open Access*” *Is Just the Tip of the Iceberg* (Oct. 22, 1999) at <http://mit.edu/Saltzer/www/publications/openaccess.html> (Internet is now “being used in ways completely undreamed of at the time of its design” because of its open design principle).

maintains a simple, nondiscriminatory network with intelligence placed in the networks' applications, or "ends" of the system. One primary benefit resulting from this architecture is innovation. Because a neutral network cannot discriminate against new applications or content, the burden placed on innovation is kept small, and, consequently, innovation booms.⁶ Moreover, the government has played a significant role in ensuring the openness of narrowband Internet by breaking up the AT&T telephone monopoly and imposing nondiscrimination and access requirements on the telephone networks. Because of this governmental policy intervention, consumers in the narrowband environment have always had the right to select the Internet Service Provider ("ISP") of their choice, rather than the ISP favored by any network owner, and considerable competition developed among ISPs.⁷

For the broadband market to flourish as narrowband Internet has done, policy makers must similarly act to ensure that consumers have nondiscriminatory access to the broadband service and content providers of their choice, rather than just the broadband services favored by

⁶ A number of articles discuss the importance for innovation of the Internet's open, end-to-end architecture. See, e.g., Saltzer, *Open Access*; Mark Lemley and Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. Rev. 925, 930-33 (2001); Jim Chen, *The Authority to Regulate Broadband Internet Access over Cable*, 16 Berkeley Tech. L.J. 677, 714 (2001); L. Lessig, *Innovation, Regulation and the Internet*, The American Prospect Online (March 27-April 10, 2000).

⁷ Many commenters and scholars agree that the wave of innovation and competition produced by the Internet resulted, not from "unregulation" of the Internet, but from regulatory policies of the FCC and Congress that kept access to the telephone network open and neutral. See, e.g., Chen, *The Authority to Regulate Broadband Internet Access* at 714-15; Lemley and Lessig, *The End of End-to-End* at 934-36; Rosemary Harold, *Cable Open Access: Exorcising the Ghosts of "Legacy" Regulation*, 28 N. Ky. L. Rev. 721, 722, 753 (2001); T.R. Roycroft, Ph.D., *Tangled Web: The Internet and Broadband Open Access Policy* at 1-5, The Public Policy Institute AARP (Jan. 2001); F. Bar, et al., *Defending the Internet Revolution in the Broadband Era: When Doing Nothing Is Doing Harm* at 1, 3, 7-8, E-conomy Working Paper 12 (Aug. 1999); F. Bar, et al., *Access and Innovation Policy for the Third-Generation Internet* at 490, Telecommunications Policy 24 (2000); Lessig, *Innovation, Regulation and the Internet* at 5; Comments of ACLU at 2; CFA at 22-23.

the entity that controls access to consumers through a bottleneck distribution platform. At the very least, the burden should be placed on those who would change past governmental policies favoring openness and nondiscrimination to show that these successful policies can be abandoned without endangering competition and innovation in the broadband environment.⁸ Certainly no commenter in this proceeding has presented a convincing rationale for departing from the regulatory principles that have kept narrowband Internet services competitive, accessible and devoid of entry barriers.⁹ In sum, the Commission must recognize that refraining from acting to ensure nondiscrimination in the provision of broadband services would not only constitute a “fundamental policy reversal” (Bar, *et al.*, *Defending the Internet Revolution* at 3),

⁸ See, e.g., Lessig, *Innovation, Regulation and the Internet* at 6 (the principles of openness and neutrality distinguishing the narrowband Internet from earlier, less successful networks “should guide us in choosing rules to govern networks in the future”); Roycroft, *Tangled Web* at 28-29 (FCC needs to extend principles of open access applicable to narrowband Internet to broadband so as to encourage competition and innovation); Bar, *et al.*, *Access and Innovation Policy* at 497 (the “successful policy trend of the past 30 years has been to force competition and assure open access to the incumbent infrastructure,” and that successful policy should not now be reversed); Bar, *et al.*, *Defending the Internet Revolution* at 30 (“[r]eversing the set of policy innovations that have led to broad American communications leadership would be unwise, at best”).

⁹ Several commenters contended that Congress did not intend for the Commission to regulate high speed Internet access services, in particular relying on 47 U.S.C. § 230(b)(2). See, e.g., Comments of Cox Communications, Inc. at 3, 12; Comcast Corp. at 17; National Cable and Telecommunications Association (“NCTA”) at 6. This section states that it is the policy of the U.S. “to preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation.” For several reasons, Section 230(b)(2) does not warrant the Commission refraining from exercising its authority over cable modem service. This section, entitled “Protection for private blocking and screening of offensive material,” is part of the Communications Decency Act, and it is extremely unlikely that Congress intended to announce any major regulatory policies affecting the competitiveness and openness of the broadband Internet in legislation primarily concerning the protection of minors from harmful materials on the Internet. Moreover, if Congress wanted to “preserve the vibrant and competitive free market that *presently exists* for the Internet” (which, in 1996 when this legislation was passed, meant *narrowband* Internet), then the Commission should adopt nondiscrimination and access requirements for cable modem service similar to those requirements that applied to the narrowband Internet in 1996 and still apply today, and that have in fact kept narrowband Internet services “vibrant and competitive.”

but would also “fatally undermine” the openness that spurred the competition and innovation in narrowband Internet services.¹⁰

III. In The Absence Of Nondiscrimination Requirements, Network Owners Will Inevitably Control Access To Consumers To Minimize Competition.

The unwillingness of network owners historically to open their networks to other service and content providers (especially unaffiliated ones) is well documented.¹¹ Network owners in the past have even insisted that they alone controlled the “right to innovation” on their networks.¹² If the FCC fails to establish the principles of openness and nondiscrimination in the

¹⁰ *Upgrading the Internet*, The Economist Technology Quarterly at 36 (March 24, 2001) (“The demise of the end-to-end principles that have served the Internet so well would be a tragedy Were that to happen, the last decade of the 20th century might come to be seen as an all-too-brief golden age of openness and innovation”).

¹¹ See, e.g., Bar, *et al.*, *Access and Innovation Policy* at 495 (in surveying government policy toward telephone networks since 1960’s, study observes that “owners of communications infrastructure strongly resisted opening their network to other service providers”); Bar, *et al.*, *Defending the Internet Revolution* at 7-9 (in discussing how government policy forced owners of the “basic phone network” to open their networks to new service and content providers, thereby leading to the success of the Internet, this study describes how AT&T for decades “resolutely” resisted “regulatory requirements to allow interconnection with its network”); L. Lessig, *Will AOL Own Everything?* Time at 106 (June 19, 2000) (in noting the “large and growing” list of uses “blocked” by cable providers of broadband Internet access, article observes that “we have never seen the owners of a large-scale network voluntarily choose to keep it open,” and that “we should not expect” owners of broadband networks to act any differently); Saltzer, *Open Access* (describing “five examples of gatekeeping that have been reported by Internet customers of cable companies” and by “[c]ustomers of Digital Subscriber Line (DSL) service”); *The Slow Progress of Fast Wires*, The Economist at 57-59 (Feb. 17, 2001) (article describing how British Telecom has refused to cooperate in the unbundling of local loops, thereby delaying the arrival of DSL service in Britain); *Too May Debts; Too Few Calls*, The Economist at 61 (July 20, 2002) (“[i]t has long been clear” that the strategy of incumbent local telephone operators “is to be obstructive as possible in opening up the local network to competitors, in the hope that these rivals all go bust before the incumbents are forced to let them in”).

¹² L. Lessig, *The Internet Under Siege*, Foreign Policy (Nov./Dec. 2001) (explaining that permission to innovate on the telephone platform was historically vigorously controlled worldwide by the telephone monopolies, and that AT&T even persuaded the FCC in 1956 to block the use of a plastic cup on the telephone receiver, designed to block noise from the telephone microphone, “on the theory that AT&T alone had the right to innovation on the telephone network”).

broadband environment, then the entities controlling the broadband distribution platforms will behave “just as every network owner in history has behaved” – they will “control access and use architecture to minimize competition.” Lessig, *Innovation, Regulation, and the Internet* at 5. In light of the historical behavior of network owners generally and the record in this and related proceedings specifically, there is no reason to believe that network owners in the broadband environment will suddenly “see the light” and allow consumers to access, on a nondiscriminatory basis, the services and content offered by unaffiliated providers or other disfavored entities.

Certainly Congress, the Commission, the courts, industry observers, and commenters in this proceeding have all recognized that the owners of cable platforms in particular have acted in the past and continue to act today to control access to consumers, discriminate against or exclude entirely unaffiliated service and content providers, and inhibit competition in both the analog and digital environments. A decade ago, Congress expressly found that cable operators, especially those vertically integrated with cable programmers, “have the *incentive and ability* to favor their affiliated programmers,” thereby making “it more difficult for noncable-affiliated programmers to secure carriage on cable systems.” Section 2(a)(5) of Cable Television Consumer Protection and Competition Act of 1992 (“Cable Act”), 47 U.S.C. § 521 nt. (emphasis added). The “ability and incentive” of cable operators to “favor” affiliated service and content providers (and to disfavor unaffiliated ones) remain unchanged in 2002, as the Commission recently concluded in its decision retaining the program access requirements of the 1992 Cable Act.¹³

¹³ *Report and Order* in CS Docket No. 01-290, FCC 02-176 at ¶ 65 (rel. June 28, 2002) (concluding that vertically integrated cable programmers continued to have the incentive and ability to favor affiliated cable operators over other multichannel video programming distributors “such that competition and diversity in the distribution of video programming would not be preserved and protected” without the program access requirements of Section 628(c) of the Cable Act).

The courts have also recognized that entities owning both distribution systems and content have a particularly strong incentive to disfavor unaffiliated content providers seeking distribution to consumers.¹⁴ Certainly cable operators have on a number of occasions demonstrated their ability and incentive to discriminate against unaffiliated service and content providers trying to obtain distribution to consumers, such as by removing the signals of broadcast television stations from their systems or by moving unaffiliated programs to less advantageous channel positions on their systems.¹⁵ Indeed, it has even been recognized that cable operators have “systemic reasons” for discriminating against competitors, particularly

¹⁴ See, e.g., *Time Warner Entertainment Co., L.P. v. U.S.*, 211 F.3d 1313, 1322 (D.C. Cir. 2000) (a cable operator has the “incentive to favor its affiliated programmers” and such an “operator may, as a rational profit-maximizer, compromise the consumers’ interests”). Judge Harold Greene, who oversaw the breakup of the AT&T telephone monopoly, also concluded that the “ability” and “incentive” for “abuse” undoubtedly existed where a network owner offered services in competition with other service providers seeking distribution over the network. *U.S. v. Western Electric Co., Inc.*, 673 F. Supp. 525, 565-66 (1987) (in any market where the regional Bell companies “are in competition with independent information service providers, their economic interest lies in manipulating the system toward use of their own services, rather than in encouraging maximum use of the network by their information service competitors”).

¹⁵ For example, the Commission in 2000 found that Time Warner’s removal of the signals of ABC-owned television stations from Time Warner’s cable systems during a “sweeps” rating period violated the Communications Act and Commission rules. See *Memorandum Opinion and Order*, DA 00-987 (rel. May 3, 2000). Time Warner also attempted to bump CNBC, an unaffiliated financial news channel, from channel 15 to 64 on its New York City cable system, a change apparently intended to favor CNNfn, Time Warner’s affiliated financial news channel and CNBC’s direct competitor. Only after CNBC agreed to assume the approximately \$1 million in advertising spending that Bravo, an arts-oriented cable channel, had earlier promised in order to obtain the channel 15 slot, did Time Warner allow CNBC to keep its channel position. B. Orwall, D. Solomon and S. Beatty, *The Bigger Picture: Why the Possible Sale of AT&T Broadband Spooks “Content” Firms*, Wall St. J. at A1 (Aug. 27, 2001). Time Warner additionally had a prolonged dispute with Gemstar, a vendor of electronic program guides (“EPGs”), over allegations that Time Warner was stripping Gemstar’s EPG information from the vertical blanking interval of local broadcasters’ signals carried over Time Warner’s cable systems to consumers. Time Warner’s actions in blocking consumer access to the EPG information of Gemstar (an unaffiliated entity) clearly operated to advantage Time Warner’s own EPG service (and potentially its own programming), to the detriment of Gemstar and competing program providers.

broadcasters, regardless of the existence of any vertical relationships because “cable has little interest in assisting, through carriage, a competing medium of communication.”¹⁶ Thus, cable operators controlling broadband distribution systems will have “little interest in assisting, through carriage” (especially on anything approaching a nondiscriminatory basis) the “competing” services and content (such as interactive television services) offered by broadcasters and other entities. *Turner Broadcasting*, 520 U.S. at 201.

The Commission itself has recognized the harms to consumers likely to result from the ability and incentive of cable platform owners in the digital environment to discriminate against unaffiliated ISPs and against unaffiliated video programmers in the provision of interactive television services. *See Memorandum Opinion and Order* in CS Docket No. 00-30, FCC 01-12 at ¶¶ 86, 217 (rel. Jan. 22, 2001) (approving merger of Time Warner and America Online with conditions designed to address these harms). In yet another example of cable platform owners disfavoring unaffiliated service providers, these owners, according to the FCC, have been reluctant to allow unaffiliated ISPs to use their broadband systems to reach consumers and unwilling to permit their customers to choose among competing ISPs.¹⁷

¹⁶ *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 201-202 (1997) (explaining that cable systems have the incentive to disadvantage broadcast competitors “in favor of programmers – even *unaffiliated* ones – less likely to compete with them for audience and advertisers”) (emphasis added). *See also* Section 2(a)(15) of Cable Act, 47 U.S.C. § 521 nt (“A cable television system which carries the signal of a local television broadcaster is assisting the broadcaster to increase its viewership, and thereby attract additional advertising revenues that otherwise might be earned by the cable system operator. As a result, there is an economic incentive for cable systems to terminate the retransmission of the broadcast signal, refuse to carry new signals, or reposition a broadcast signal to a disadvantageous channel position.”).

¹⁷ *See Eighth Annual Report* in CS Docket No. 01-129, FCC 01-389 at ¶ 46 and notes 136, 137 (rel. Jan. 14, 2002) (“unlike high-speed access offered over the telephone network where the customer can select” the ISP of “his own choice, the cable ISP is selected by the cable provider”; “[m]ost cable operators offer only one ISP to customers in a given cable system,” and “[m]ost

A number of cable system operators have additionally imposed restrictions on both content providers and on subscribers that limit the types of services and content that providers may offer and consumers may receive. Industry observers have discussed at some length the actions taken by cable operators to restrict the amount of programming that cable programming networks can stream directly to consumers over the Internet, thereby protecting their ability to charge premium rates for streaming video to television.¹⁸ As early as 1999, the customers of cable companies were reporting various types of limitations and restrictions on their broadband Internet service,¹⁹ and commenters in this proceeding also identified “troubling restrictions” placed by cable operators on their Internet customers’ “use of devices and access to applications and sites.”²⁰ Given the cable industry’s long record of inhibiting competition and consumer choice by discriminating against (or even denying access to) unaffiliated service and content providers, it is not surprising that a number of industry observers have concluded that cable

cable providers hold [an] interest in the chosen ISP and also provide proprietary content to that ISP”).

¹⁸ See, e.g., Orwall, Solomon and Beatty, *The Bigger Picture* at A1; S. Schiesel, *Charter Removes ESPNNews from Some Cable Systems in Dispute*, The New York Times, Section C, Page 2 (July 2, 2001); L. Moss, *Operators Back Charter in Web Dispute*, Cable World at 1 (June 4, 2001); R.T. Umstead and S. Donohue, *Making Tense Times Worse*, Multichannel News at 1 (June 4, 2001); Lessig, *Will AOL Own Everything?*; Saltzer, *Open Access*.

¹⁹ Saltzer, *Open Access* (identifying and discussing video limits, server restrictions, fixed backbone choice, the filtering of data packets, and restrictions on attaching home networks).

²⁰ Comments of High Tech Broadband Coalition at 10-13 (describing restrictions on the type of data subscribers can send and receive; the imposition of additional charges for sending or receiving certain content; restrictions on the attachment of equipment; and the reservation by the cable operator of the right to impose discriminatory restrictions in the future). See also Comments of CFA at 35-39 (pointing out that cable operators, whenever they do offer “commercial access” to independent ISPs, place various limits on those ISPs, including restrictions on the types of services they can offer, such as allowing them to offer Internet access only, and that such restrictions will, *inter alia*, “retard[] competition for video services”).

companies' interests and practices pose the most serious threat to openness and innovation in the broadband environment.²¹

In sum, it has been long recognized that cable system operators possess the capability and incentive to favor affiliated service and content providers and to disfavor unaffiliated ones.

Because platform owners (whether cable operators or incumbent local exchange carriers ("ILECs")) control the facilities that service and content providers need to reach consumers, these owners have power over both who may offer services that are transmitted over those facilities and the content that is transmitted. In this manner, as commenters in this proceeding recognized,²² bottleneck control over physical transmission facilities can easily be leveraged into control of downstream markets, including the provision of various broadband services such as interactive television.

²¹ See, e.g., Roycroft, *Tangled Web* at vi ("Cable companies, because they control broadband Internet access facilities and high-speed data networks, as well as sources of Internet content, have the greatest potential to interfere with the openness of the Internet structure and to reduce the benefits that have been generated by the open architecture of the Internet."); Bar, *et al.*, *Access and Innovation Policy* at 497 ("one provider, the monopoly cable franchise, with significant market power," is "in a position to prevent open access" to broadband Internet); L. Lessig, *Cable Blackmail*, *The Industry Standard* (Nov. 14, 1999) (stating that the cable system for providing broadband Internet "is being designed" to limit competition and restrict consumer choice, even though "[c]able networks can be designed to be open just as phone networks are"); Bar, *et al.*, *Defending the Internet Revolution* at 10-11, 24 (study discussed cable's market power and the "damaging consequences" of "[c]able control of broadband access to the Internet"); *Upgrading the Internet* at 33-34 (because many broadband providers such as cable operators offer content to their subscribers, broadband "providers have no incentive to supply rapid access to competing providers' content," and because broadband providers generally "own the physical connections into their subscribers' homes," they are "in a position to place limits on the kinds of services that can be provided over their connections").

²² See, e.g., Comments of ACE at 10; CFA at 33-39; Amazon.com at 4-8; Vermont Public Service Board and Vermont Dept. of Public Service ("Vermont") at 5-8; *Ex Parte* Comments attached to Comments of State of California and California Public Utilities Commission ("California *Ex Parte*") at 23-24.

Content providers such as broadcasters are particularly concerned about the clear ability and incentive of cable operators with affiliated ISPs to engage in content-based discrimination of Internet content. These cable-affiliated ISPs can, for example, channel consumers to affiliated services or sites in a number of ways, such as by speeding access to favored sites or by giving affiliated content preferred caching treatment. *See, e.g.*, Comments of Amazon.com at 6-8; Vermont at 7-10; ACE at 13. Indeed, broadband communications systems have been purposefully designed to permit platform owners to use technology to discriminate against unaffiliated or other disfavored content. For instance, Cisco Systems has routers that give Internet and cable companies “the ability to change the quality of the access,” depending upon the type of content being accessed, so that an “ISP could provide faster service” to an affiliated Web site “than to a very similar,” but unaffiliated, “Web site.” T. Hearn, *Senators Wonder About Cisco Web Gear*, Multichannel News at 38 (May 15, 2000). Equipment designers even market their system products by touting their ability to “circumscrib[e] access to a defined range of approved Web pages” and “store content” so as to “allow[] for greater control over” it. ICTV Inc., White Paper, *The ICTV Digital System* at 2, 9 (2001) (describing the company’s digital interactive television delivery platform and how it would allow cable operators to create “highly controlled” “walled gardens” and “walled jungles” of television content, as well as “fenced prairies,” which would restrict consumer access to a limited range of approved “content partners on the Web”).²³ Given this power of bottleneck facilities’ owners to impede access to consumers

²³ In this regard, content providers have previously expressed concern about the ability of cable platform owners to control the upstream and downstream delivery of interactive television services over broadband systems, thereby allowing various types of technological discrimination against unaffiliated and other disfavored providers of interactive television services and content. *See, e.g.*, Comments of NAB in CS Docket No. 01-7 (filed March 19, 2001); Reply Comments of NAB in CS Docket No. 01-7 (filed May 11, 2001); *Ex Parte* Submission of The Walt Disney Company, *Deployment of Interactive Television Technology and Return Path Discrimination*, CS

and thwart competition, content providers lacking their own distribution platforms clearly have ample cause for concern about the ability of cable operators (especially those with exclusive arrangements with affiliated ISPs) to control whether independent content can reach consumers hemmed in behind “walled gardens” and “fenced prairies” of video and Internet content.²⁴

Whatever regulatory label is ultimately attached to the provision of high speed Internet access over cable modems, one point is clear. Given the ability and incentive of platform owners who control an essential pathway into consumers’ homes to encumber or even exclude unaffiliated services and content, the Commission’s failure to adopt nondiscrimination standards will inevitably produce a broadband marketplace characterized by minimal competition, a lack of innovation, and severely restricted consumer choice.²⁵ If broadband services are to develop to their fullest potential, the Commission must in particular restrain platform owners from leveraging their control over the bottleneck facilities needed to reach consumers into control over

Docket No. 00-30 (filed Oct. 25, 2000); Comments of Non-MVPD Owned Programming Networks in CS Docket No. 01-7 (filed March 19, 2001). An economic analysis conducted in the interactive television proceeding concluded that “a (vertically integrated) cable firm has the ability and the incentive to engage in anticompetitive behavior against unaffiliated interactive content providers” in several ways. Declaration of J. Gregory Sidak and Hal J. Singer in CS Docket No. 01-7 at 5, attached to Reply Comments of Non-MVPD Owned Programming Networks (filed May 11, 2001). NAB therefore supports the adoption of nondiscrimination safeguards to prevent a cable platform owner from treating the interactive content of an unaffiliated video provider carried on the broadband cable system less favorably than the interactive content of an affiliated video programmer.

²⁴ See, e.g., R. Grover and T. Lowry, *For Media Giants, How Big Is Big Enough?*, Business Week at 38 (July 30, 2001); Orwall, Solomon and Beatty, *The Bigger Picture* at A1; D. Carney, *The FTC Should Open The Broadband Gates*, Business Week at 46-48 (Oct. 23, 2000) (all citing concerns of content providers that platform owners will restrict their ability to reach consumers on a nondiscriminatory basis).

²⁵ See *Time Warner Entertainment*, 211 F.3d at 1321 (in cable context specifically, court found that facilities’ owners have a true “bottleneck monopoly” that constitutes “a physical and economic barrier” to competition).

downstream markets. As has been noted specifically, one danger presented by the 1996 Telecommunications Act “is that existing monopolies, *such as the BOCs or cable operators*, will leverage their current power either to *gain an unfair advantage in a competitive market*, or to retain their advantage in the local arena.” M.I. Myerson, *Ideas of the Marketplace: A Guide to The 1996 Telecommunications Act*, 49 Fed. Comm. L.J. 251, 287 (1997) (emphasis added). This danger “will have to be averted in order for the [1996] Act to be successful,” *id.*, and the Commission should help assure the success of the 1996 Act by preventing the leveraging of platform owners’ control over bottleneck facilities into the market for broadband services, including interactive television.²⁶

In light of this ability and incentive of *all* platform owners to discriminate against (or even exclude entirely) unaffiliated service and content providers, the Commission should reject the self-serving arguments advanced by cable operators that the Commission should continue regulating broadband access services provided by the telephone companies, but should not impose any similar nondiscrimination requirements on cable operators offering cable modem services. *See, e.g.*, Comments of AT&T Corp. at 6-7, 24; Comcast Corp. at 26. In an attempt to justify this disparity in the regulatory treatment of very similar high-speed Internet access

²⁶ See Carney, *The FTC Should Open the Broadband Gates* at 46 (FTC or FCC must develop a “policy for open access” that applies across the cable industry so that broadband Internet “remain[s] open to competition – and free of stifling monopolies”); A. Klein, C. Stern and F. Ahrens, *Comcast-AT&T Deal Spotlights Bigger Drama*, Washtech.com at A01 (Dec. 21, 2001) (expressing concern that government is increasingly allowing platform owners to exercise control over the kind of innovation and content carried on their “pipes”); Editorial, *Things We Don’t Like*, Business Week at 114 (March 18, 2002) (FCC’s proposals for wireline broadband Internet access services will not “boost[] competition,” but will only give “more monopoly power in new markets” to ILECs); *Too Many Debts; Too Few Calls*, The Economist at 61 (July 20, 2002) (noting that local telephone companies in both Europe and America “are doing their best to establish new monopolies in broadband Internet access,” and arguing that “a concentration of power in the hands of fewer companies implies a need for stronger, not lighter, regulation”).

services, Comcast argued that “telephone companies have a long record of resisting competition.” Comments of Comcast at 26. Given the lengthy record of cable platform owners inhibiting competition by discriminating against or excluding entirely unaffiliated service and content providers (some of which is described above), this claim seems a clear example of the pot calling the kettle black. Earlier this summer the Commission expressly found that cable operators have withheld vertically integrated “programming from competitors as a competitive tactic,” *Report and Order* in CS Docket No. 01-290 at ¶ 55, and that, “given the opportunity,” cable entities “will foreclose strategic programming, either new or existing, to one or both DBS competitors to undermine their service offering and harm their competitive ability.” *Id.* at ¶ 60. If a “record of resisting competition” justifies continued imposition of nondiscrimination and other requirements on ILECs offering high speed Internet access services, then the cable operators’ same “record” would justify the adoption of nondiscrimination requirements applicable to them.

AT&T similarly contended that continued regulation of wireline broadband access services is necessary because the ILECs have “substantial market power” and may have incentives not to promote their broadband services aggressively because such services compete with the ILECs’ “legacy monopolies.” Comments of AT&T at 6-7. In responding to this argument, NAB finds that another old adage applies – “what’s good for the goose is good for the gander.” In other words, that same rationale supports imposing on cable platform owners nondiscrimination requirements similar to those applicable to ILECs. If, as AT&T asserted, the ILECs have substantial market power, cable operators, according to the Commission, “*dominate* the market for the distribution of video programming,” which is “highly concentrated and characterized by substantial barriers to entry.” *Report and Order* in CS Docket No. 01-290 at ¶¶

45, 53 (emphasis added).²⁷ Cable platform owners also control “the *primary* means of accessing the Internet over broadband networks.” *Eighth Annual Report* at ¶ 44 (emphasis added).²⁸

Beyond cable’s preeminent position in both the MVPD and broadband markets, cable operators also have clear economic incentives to restrict broadband services (especially the streaming of video) that compete with their own “legacy monopoly” (the provision of video programming via television).²⁹ Thus, if the possession of market power and an incentive to protect a legacy monopoly warrant the continued regulation of ILECs’ wireline broadband services, then those same factors would warrant the adoption of similar nondiscrimination requirements for cable operators offering cable modem services.

IV. A Monopolized Or Duopolized Broadband Market Would Stifle Competition And Innovation, Discourage The Development Of Diverse Broadband Content, And Constrict Consumer Choice.

If the cable and telephone companies that own bottleneck transmission facilities are permitted to behave “just as every network owner in history has behaved,” Lessig, *Innovation, Regulation, and the Internet* at 5, then the result would be an uncompetitive broadband marketplace dominated by a single, or at best two, gatekeepers controlling access to consumers

²⁷ Other economic studies have similarly concluded that “cable firms have market power” in the multichannel video programming distribution (“MVPD”) marketplace. Declaration of J. Gregory Sidak and Hal J. Singer in CS Docket No. 01-7 at 20.

²⁸ Industry analysts also believe that the cable industry will maintain its lead over its telephone competitors in the broadband marketplace because of the “higher costs and physical limits” of DSL service. *Financial Analysts Tell NCTA Cable’s Day Will Come Again*, Communications Daily at 7 (May 8, 2002).

²⁹ See *supra* at 10. Beyond video limits, commentators have explained that other reported instances of gatekeeping by cable companies offering cable modem service may similarly be the result of a “conflict of interest.” Saltzer, *Open Access* (explaining how an access provider has an “incentive to find a technical” or other “excuse to filter out services that compete with the entertainment or Internet services it also offers”).

in nearly all areas.³⁰ Commenters emphasized that virtually no consumers are served by more than two broadband providers, and a large percentage of consumers today have only one provider of broadband service available to them.³¹ Possibly as a result of the geographic limitations on the offering of DSL services, cable modem services currently have a substantially greater number of subscribers than DSL services,³² and some commenters contended that cable modem services are superior in this and other ways to DSL service and will likely remain the dominant type of broadband provider for residential users. *See, e.g.*, The City Coalition at 26-27; ACLU at 3; Vermont at 7; Earthlink at 5. In the absence of nondiscrimination requirements, cable and telephone company platform owners would therefore be free to discriminate against – if not exclude from their broadband networks entirely – any or all unaffiliated service and content providers. *See supra* discussion at 6-14. Commenters in this and related proceedings, as

³⁰ In any particular geographic area, the local cable franchisee and the local telephone company generally control “last mile” access into consumers’ homes. The provision of high speed Internet access is consequently dominated by the modem service offered by cable operators and the DSL service offered by ILECs. Satellite and wireless technologies offering high speed Internet services control a very small percentage of this market and “are not expected to increase market share over the next several years.” *Eighth Annual Report* at ¶ 44. *See also High-Speed Services for Internet Access: Status as of December 31, 2001*, Industry Analysis and Technology Division, Wireless Competition Bureau at 2 (July 2002) (reporting that high-speed Internet connections to end-user customers by means of satellite or fixed wireless technologies account for a very small number of high-speed connections, especially in comparison to cable modem or DSL connections, and that the rate of increase in the number of satellite or wireless connections is much lower than for cable modem or DSL connections); Comments of California at 4; Earthlink at 5 (discussing the technical, cost and other inadequacies of wireless and satellite technologies for delivering broadband services).

³¹ *See, e.g.*, Comments of ACE at 11; California at 3-4; Earthlink at 5-6. According to the FCC’s most recent figures, 40% of the nation’s zip codes still are not served by multiple providers of high-speed services. *See High-Speed Services for Internet Access* at 4.

³² According to the Commission, there are approximately 7.1 million high-speed lines in service over cable systems and approximately 3.9 million high-speed DSL lines in service. *High Speed Services for Internet Access* at 2.

well as industry observers, agree that the resulting broadband marketplace would be an uncompetitive “limited contest among sector monopolies.” Comments of Covad Communications in CC Docket No. 02-33 at i, iii (arguing that FCC’s broadband proposals “abandon the effort to promote competition in local telecommunications markets, and instead promote a new monopoly” or “a duopoly”).³³

Even assuming the “best case” scenario of a duopoly in the provision of broadband services, the result will be an uncompetitive broadband marketplace that discourages innovation and restricts consumer choice. As a general matter, NAB observes that the antitrust authorities and the courts have agreed that duopolies (and even oligopolies) create serious competition problems.³⁴ Telecommunications industry observers have also concluded that “duopolized” markets are inherently uncompetitive.³⁵ Because duopolies have been found to be *prima facie*

³³ *Accord* Comments of CFA at 22-23 (FCC’s policies will result in creation of facilities duopoly that will allow gatekeeper facilities owners to favor their affiliated services and content at the expense of unaffiliated service providers); ACE at 10-11 (competitive narrowband Internet marketplace will be jeopardized if FCC allows broadband Internet marketplace to be limited to two “bottleneck” platforms closed to unaffiliated service providers). *See also* Steve Rosenbush, *Broadband Policy: Did Somebody Say Oligopoly?*, Business Week at 40 (March 18, 2002); Earl Comstock and John Butler, *Access Denied*, 8 CommLaw Conspectus at 10 (FCC’s present policies will result in cable/ILEC oligopoly in broadband services).

³⁴ *See, e.g., FTC v. H.J. Heinz Co.*, 246 F.3d 708, 717-18 (D.C. Cir. 2001) (granting FTC’s request to enjoin “a merger to duopoly” in baby food market because FTC established *prima facie* case that merger would be anticompetitive); *Hospital Corporation of America v. FTC*, 807 F.2d 1381, 1387 (7th Cir. 1986) (upholding FTC’s decision that hospital chain’s purchase of two hospital corporations violated antitrust laws because the acquisition reduced the number of competitors in the local hospital market to four, and this “reduction in the number of competitors” would affect the “competitive vitality” of the market by making it “easier” for the remaining competitors to “coordinate their pricing”).

³⁵ *See, e.g., Happy Birthday, BT*, The Economist at 54 (July 6, 2002) (complaining that government policy for years allowed a duopoly to persist in both traditional telephone service and in the new mobile phone industry in Britain, which predictably resulted in a “snug little cartel that kept prices high and service innovation low”). Commenters in the wireline Internet proceeding similarly argued that a duopoly does not provide competitive performance, in particular citing evidence from the U.S. cellular telephone market before entry by PCS carriers.

anticompetitive, *FTC v. Heinz*, 246 F.3d 708, NAB cannot see how the Commission could accept a broadband marketplace dominated by a cable/ILEC duopoly as sufficiently competitive or efficient.

A number of commenters in this proceeding specifically similarly agreed that a facilities duopoly in the broadband marketplace will not be sufficient to ensure competition, innovation and consumer choice. *See, e.g.*, Comments of Amazon.com at 2-6; CFA at 22-23; ACE at 10-11; California at 5. Amazon.com in particular argued that, even assuming “several forms of broadband service” will be “available” to consumers (which “is, of course, a big ‘if’”), “intermodal broadband facilities competition alone” could not provide adequate competition in the broadband environment to ensure that consumers have “unimpeded” access “to all Internet-based information, products, and services.” Comments of Amazon.com at 4-6. According to Amazon.com, facilities competition fails to alleviate concerns about consumer choice in large part because “there is tremendous friction for a consumer to move among available broadband technologies.” Due to “sunk equipment costs, start-up hassles” and other difficulties, a consumer “cannot reasonably be expected to switch among” types of broadband service in order to address problems with his or her existing provider. *Id.* at 5-6.³⁶ Aside from well-founded concerns that

³⁶ For example, the owner of the broadband platform and its affiliated ISP may, in a variety of ways, “intentionally impede consumer access to Internet-based information, products, and services” so as to favor the services and content in which the platform owner has an ownership interest. Comments of Amazon.com at 6. Amazon.com also pointed out that, even without a direct ownership interest, an ISP could have incentives to impede consumer access if, for instance, the ISP has “accept[ed] compensation from another party” to “impede consumer access to yet another party’s services.” *Id.* Given the difficulties inherent in switching between cable modem service and wireline broadband service, Amazon.com clearly thinks it unlikely that consumers can deter platform owners from engaging in this type of behavior by changing their broadband provider (even assuming that multiple forms of broadband service will be available to individual consumers).

duopolized markets are inherently uncompetitive and inefficient, the record in this proceeding also shows specific grounds for concluding that a cable/ILEC facilities duopoly in the broadband market will provide inadequate competition to safeguard consumer choice. Arguments by the cable industry that DSL service provides sufficient competition to cable modem service in the broadband marketplace must accordingly be rejected. *See, e.g.*, Comments of NCTA at 41.

And even if, at some point in the future, more than two types of broadband distribution platforms were to become competitively viable, the owners of any additional platform or platforms would have the *same* incentive and ability, as cable platform owners now have, to favor their affiliated content and services and to disfavor all independent providers. Moreover, each one of these broadband platform owners would constitute a bottleneck *as to its individual customers*. In this manner, the “bottleneck problem of cable Internet access is perfectly analogous to that of cable television; namely, as soon as one subscribes, the cable operator becomes an effective gatekeeper between the subscriber and all of the content or programming available through that medium.”³⁷

Given this “perfect” analogy between the bottleneck problem of cable television and cable broadband access, the Commission should therefore follow in the broadband context the logic of its recent decision on program access in the cable context. In its order retaining the cable program access rules, the Commission concluded that “competition and diversity in the distribution of video programming would not be preserved and protected” without retention of the rules, especially in light of the continuing “incentive and ability” of vertically integrated

³⁷ David Wolitz, *Open Access and the First Amendment*, 4 Yale Symp. L. & Tech. 6 at ¶ 29 (2001). As the Supreme Court has specifically found, “[w]hen an individual subscribes to cable [television], the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber’s home.” *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 656 (1994).

cable operators and programmers to favor affiliated entities over unaffiliated MVPDs and programmers. *Report and Order* in CS Docket No. 01-290 at ¶ 65. Logic accordingly dictates that, given the incentive and ability of cable and other broadband platform owners to favor affiliated service and content providers over unaffiliated ones, competition and consumer choice in the delivery of broadband services and content would not be preserved and protected without the adoption of nondiscrimination safeguards.³⁸

Furthermore, NAB again stresses that independent service and content providers lacking their own distribution facilities to reach consumers will, in the broadband marketplace, be completely dependent on bottleneck platform owners, each of which will have the incentive and ability to discriminate against them. And if the cable and other gatekeeper platform owners are permitted to discriminate against – or even to exclude entirely – unaffiliated service and content providers, then the broadband marketplace will consequently suffer from a lack of innovation and consumer choice. Only if broadband service and content providers are assured of a “clear and uninterrupted path to the ultimate consumer free of any potential disruption or discrimination” by the owners of bottleneck distribution facilities will these providers have the optimal incentives to invest in and develop new and innovative broadband services.³⁹

³⁸ Other similarities between the MVPD market and the broadband Internet market also support the adoption of analogous nondiscrimination safeguards. Both markets are currently dominated by two distribution platforms – wired cable and DBS in the MVPD market and cable modem and telephone wireline in the broadband market. As a result, both markets are highly concentrated ones in which consumers have limited choices among providers. Cable platform owners are, in addition, the preeminent providers in both markets.

³⁹ *The Future of the Interactive Television Services Marketplace: What Can the Consumer Expect?*, Hearing Before the Subcomm. on Telecommunications, Trade and Consumer Protection of the House Commerce Committee (Sept. 27, 2000) (statement of Rep. Rick Boucher). Representative Boucher, a recognized expert on Internet policy matters, also stated in this hearing that the “time has come” to “assure content providers access” by making “open access the uniform national policy, and to make it applicable to all Internet transport platforms.”

Conversely, if the cable or other gatekeepers are permitted to control the distribution platforms so as to encumber or disrupt the “path to the ultimate consumer,” then service and content providers will be less inclined to invest in new and innovative services. Innovators are simply less likely to spend time and money developing products and services for a market where gatekeeper platform owners have “the power to control whether that innovation will ever be deployed.” Lemley and Lessig, *The End of End-to-End* at 945.⁴⁰ In this way, consumer choice will also be constricted, as a less diverse range of services, applications and content will ultimately be developed for the broadband marketplace.⁴¹

V. The Primary Arguments Advanced By Cable Interests Against Any FCC Action Are Predictable, Repetitive And Unconvincing.

In arguing that the Commission should refrain from regulating cable modem services (and especially from imposing any type of nondiscriminatory access requirement), cable interests have repeated their entirely predictable claims that any regulation would discourage investment in and deployment of broadband technology and automatically raise serious constitutional problems. These overly familiar and unmeritorious claims should not deter the Commission from acting to safeguard competition and consumer choice in the broadband environment.

A. Preventing Cable Operators from Discriminating Against Unaffiliated Broadband Services and Content Will Not Discourage Investment in Broadband Distribution Facilities or New Services and Content.

⁴⁰ *Accord* Wolitz, *Open Access* at ¶ 38 (“Who, after all, would spend their time developing broadband Internet technologies if they were not sure such applications would be allowed to run on the cable platform?”).

⁴¹ And even assuming that unaffiliated entities would still undertake the development of new and innovative broadband services and content, these products might not be allowed to reach consumers in an unencumbered manner, given the ability and incentive of gatekeeper platform owners to block, delay or degrade the distribution of unaffiliated services and content. *See supra* 7-14.

In claiming that regulation (especially nondiscriminatory access) would deter investment in and deployment of cable modem facilities and high-speed Internet services,⁴² the cable interests repeat the same arguments made in a number of earlier FCC proceedings.⁴³ For a variety of reasons summarized below (and set forth in greater detail by NAB and other commenters in these previous proceedings),⁴⁴ the Commission should reject these incentive and investment arguments.

As an initial matter, NAB points out that, regardless of any nondiscrimination or other requirements the FCC may adopt pertaining to cable modem services, cable operators will continue upgrading their distribution facilities so as to be able to offer a variety of services, including digital cable, pay-per-view services, video-on-demand and even telephony.⁴⁵ In fact, a

⁴² See, e.g., Comments of NCTA at 24-26; Cox Communications at 32; Cablevision Systems Corp. at 7.

⁴³ See, e.g., Comments of NCTA in CS Docket No. 01-7 at 28-36 (filed March 19, 2001) (contending that FCC's adoption of nondiscrimination or any other regulation applicable to interactive television services would deter investment in and delay the deployment of interactive television distribution facilities and services); NCTA in GN Docket No. 00-185 at 57-62 (filed Dec. 1, 2000) (access regulation would impose significant burdens and complexities that will deter investment in high-speed Internet facilities and services); Time Warner Cable in CS Docket No. 98-120 at 23 (filed June 11, 2001) (claiming that cable operators' incentives to invest in further upgrades of their facilities would be blunted if FCC adopted certain digital must carry requirements). Indeed, cable interests previously told the FCC in one proceeding that rate regulation had eviscerated their incentive to add cable programming and made it difficult or impossible to expand their audiences, but argued in a different proceeding that the must carry rules were cause of these same problems. Cable's audiences at that time were, in actual fact, rapidly increasing. See Brief for NAB, *Turner Broadcasting System v. FCC*, No. 95-992 (Sup. Ct. June 17, 1996) at 43 and note 86.

⁴⁴ See, e.g., Reply Comments of NAB in CS Docket No. 01-7 at 12-20 (filed May 11, 2001); Reply Comments of Non-MVPD Owned Programming Networks in CS Docket No. 01-7 at 17-19 and Attachment A (filed May 11, 2001); Comments of the Competitive Access Coalition in GN Docket No. 00-185 at 75-81 (filed Dec. 1, 2000); Comments of the Competitive Telecommunications Association in GN Docket No. 00-185 at 30-32 (filed Dec. 1, 2000).

⁴⁵ See, e.g., Roycroft, *Tangled Web* at 23 (cable operators upgrade their networks to offer a variety of services, including voice); J.K. MacKie-Mason, *Investment in Cable Broadband*

report by the cable industry itself stated that the provision of digital video (with “massive increases in the amount of programming” that can be delivered) is a primary impetus behind the upgrading of cable distribution facilities. W.S. Ciciora, *Cable Television in the U.S.* at 47, Cable Television Laboratories, Inc. (1995). The adoption of nondiscrimination requirements, or other policies relating to cable modem service specifically, will certainly not cause cable operators to forego the tremendous business and growth opportunities presented by the myriad of broadband services.⁴⁶ Indeed, if cable operators are truly as concerned about competition from DBS as they frequently assert, then they will have every incentive to continue upgrading their facilities and to provide new broadband services (including, for example, interactive television) to maintain their preeminent position in the MVPD marketplace, as well as to prevent loss of market share for high speed Internet access to providers of DSL services.⁴⁷ The Commission’s adoption of nondiscrimination or access requirements applicable to cable modem services will not in any way eviscerate these economic incentives for investment in broadband facilities. Just as the Commission has rejected on a number of occasions arguments by telephone companies that regulatory requirements (including those relating to access to closed networks) would seriously

Infrastructure: Open Access Is Not an Obstacle at 12 (Univ. of Michigan, Nov. 5, 1999) (“*Investment Study*”) (study explains that cable operators are upgrading their facilities and making investments in broadband to offer a variety of services, including digital television and telephony, and noting that cable operators specifically mention “increased video channel capacity as one of the reasons” for system upgrades).

⁴⁶ In fact, the FCC itself has noted that cable operators continue to deploy advanced services “at a rapid pace,” and such services include not only digital video and cable modem services, but are beginning to include “other advanced service offerings such as video-on-demand” and “Internet protocol telephony.” *Eighth Annual Report* at ¶ 34.

⁴⁷ Reducing or delaying “investment in broadband cable facilities, and thereby losing a substantial share of the market [to telephone companies offering DSL], is not a sensible strategy for cable operators.” MacKie-Mason, *Investment Study* at 26.

reduce investment incentives, the Commission should similarly reject these arguments by the cable industry in the high-speed Internet context.⁴⁸

Beyond cable's economic incentives to invest in upgrading their distribution facilities, NAB moreover notes that considerable investment in broadband infrastructure has already been made. Indeed, a number of cable operators have been obligated by "Social Contracts" made with the Commission in the 1990's to upgrade their systems significantly. As one relevant study of cable investment observed in 1999, a "great deal of investment in cable broadband facilities has already been made, and this sunk investment would not be affected" by nondiscrimination or access requirements applicable to cable modem service. MacKie-Mason, *Investment Study* at 8. This conclusion has even more force today, given the upgrading of the cable infrastructure that has occurred since 1999.

The Commission should also reject any claims that nondiscrimination or access obligations would discourage cable operators from investing in their own broadband services and content.⁴⁹ In essence, the cable interests are contending that the only way for them to earn, on their own broadband content and services, a profit sufficient to provide the incentives for

⁴⁸ For example, throughout its history, AT&T repeatedly argued that opening its network to devices like Carterfone or alternative service providers like MCI would hinder investment. "Regardless of this, regulatory action to introduce competition proceeded and network investment continued." Bar, *et al.*, *Access and Innovation Policy* at 508. More recently, the FCC has rejected arguments by ILECs that price regulation of line sharing would reduce their incentives to develop advanced services. See *Third Report and Order* in CC Docket No. 98-147 and *Fourth Report and Order* in CC Docket No. 96-98, 14 FCC Rcd 20912, 20979 (1999). ILECs continue, moreover, to invest in DSL facilities, even though they are subject to nondiscrimination and access requirements. MacKie-Mason, *Investment Study* at 26. Studies have also specifically concluded that cable companies' threats that a multiple ISP or open access requirement in particular would deter them from investing in broadband facilities were "not credible." MacKie-Mason, *Investment Study* at 2.

⁴⁹ See, e.g., Comments of NCTA at 25-26 (cable operators' incentives to invest in content that takes advantage of broadband capabilities will be reduced by access requirements).

investing in and offering those services would be to have the legal right to discriminate against (or even to exclude entirely) the offerings of competing providers. The Commission must reject outright this argument. There is simply no need to extend cable companies' gatekeeper control over the distribution platform into new markets for broadband services and content so as to provide adequate investment incentives.⁵⁰ Indeed, other studies have concluded that the "FCC's *failure* to impose nondiscrimination protections would actually decrease investment" in broadband content (such as interactive video programming) by "unaffiliated content providers." If unaffiliated content providers believe that innovative content "will not be protected from discrimination, then those providers will far less be willing to incur risks in the development" of such content, and "the aggregate level of investment" in broadband content "would decrease." Declaration of J. Gregory Sidak and Hal J. Singer in CS Docket No. 01-7 at 29. *See also* discussion at 21-22 above.⁵¹ For all these reasons, nondiscrimination and access requirements

⁵⁰ *See, e.g.,* Roycroft, *Tangled Web* at 22 ("a critical economic reason" for imposing access requirements is "to mitigate" the cable operator's "ability to leverage its access market power into higher levels of the Internet"); Comments of America Online in CS Docket No. 98-178 at 36 (Oct. 29, 1998) ("a facilities-based service provider" does not need to "capture *supranormal* economic profits" to provide an "incentive to deploy or develop new technology," and, thus, there is no justification for the claim that broadband investment will occur only if cable operators are allowed "to deal exclusively" with affiliated entities); *Ex Parte* Comments of Professors Mark A. Lemley and Lawrence Lessig in CS Docket No. 99-251 at 36 (refuting argument that "we must grant cable companies not just a monopoly over the wires, but a right to expand that monopoly into competitive markets, in order to give them an incentive to implement broadband services," which "is simply wrong as a matter of economics"); Lessig, *Cable Blackmail* (claim that cable interests need to extend their monopoly beyond the cable network to have the incentive to invest in broadband is "blackmail," and suggests a "deep monopoly problem" in the industry); Bar, *et al., Access and Innovation Policy* at 507-509 (refuting on a variety of grounds the cable industry's argument that, "if it cannot impose its affiliated ISP as the exclusive choice for cable broadband access, its network upgrades will be too risky and unprofitable to warrant" the necessary investment).

⁵¹ Furthermore, unaffiliated content and service providers cannot simply invest in competing means of distribution in order to reach consumers. *See* Comments of Cox Communications at 32 (suggesting that access requirements would decrease investment in broadband services because

will not deter cable operators' investment in either broadband distribution facilities or in broadband services and will, in fact, encourage the more rapid development of innovative broadband services and content.

B. No Serious Constitutional Concerns Are Raised by FCC Regulation of Cable Modem Service.

Various cable interests have asserted that nondiscriminatory access requirements would raise serious constitutional questions under either or both the First and Fifth Amendments to the Constitution. The Commission should reject these entirely predictable, repetitive and unmeritorious constitutional arguments.

Claims that a nondiscriminatory access obligation imposed on providers of cable modem service would constitute a taking without just compensation in violation of the Fifth Amendment are so lacking in merit as to be frivolous.⁵² Just as NAB has explained in greater detail in proceedings involving cable operators' obligation to carry the digital signals of broadcast stations,⁵³ the Supreme Court has clearly held that only a "permanent *physical* occupation of *real* property" presumptively constitutes a taking requiring "just compensation." *Loretto v.*

Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427-28 (1982) (emphasis added). A

"providers who otherwise would make investments in broadband facilities may instead take advantage" of regulated access to the cable platform). Many broadband service and content providers may likely be small entities or start-ups, and even larger unaffiliated providers will not have the resources or time to finance and then wait for the deployment of an entire competing distribution system for their broadband services and content. And if new and innovative services and content are not developed by unaffiliated providers, due to their uncertainty about reaching consumers, then consumers will have fewer incentives to subscribe to either cable modem or DSL services.

⁵² See, e.g., Comments of Cox Communications at 37; Comcast Corp. at 20; AOL Time Warner at 45-46; Cablevision Systems Corp. at 11.

⁵³ See NAB *Ex Parte* in CS Docket No. 98-120 (filed Aug. 5, 2002); NAB Reply Comments in CS Docket No. 98-120 at 81-88 (filed Dec. 22, 1998) (refuting very similar assertions by cable interests that certain digital must carry obligations would constitute a Fifth Amendment taking).

nondiscriminatory access obligation that merely involves the *use* of a part of a cable operator's carriage capacity in no way resembles the "permanent physical occupation of real property" that automatically requires compensation under the Fifth Amendment, but merely regulates the manner in which cable companies allocate and employ their capacity. *See Loretto*, 458 U.S. at 436, 441 (court expressly recognized the government's "broad power to impose appropriate restrictions upon an owner's *use* of his property," and stressed that a physical invasion and occupation of one's property "is qualitatively more severe than a regulation of the *use* of property, even a regulation that imposes affirmative duties on the owner") (emphasis in original).⁵⁴ Indeed, were the Commission to accept the argument that rules prescribing the traffic to be carried on a wire or through other means of communication constitute a physical taking under *Loretto* akin to a condemnation of land, a vast range of FCC regulations -- including many specifically required by Congress -- would be jeopardized.⁵⁵

At most, then, a requirement providing unaffiliated service providers (such as independent ISPs) access to the distribution capacity of cable operators deprives those operators of the unfettered use of certain corporate assets to serve a public purpose -- a governmental action befitting the label "regulatory taking" and triggering only a deferential and "fact specific inquiry" under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 122 S.Ct.

⁵⁴ *See also Satellite Broadcasting and Communications Association v. FCC*, 275 F.3d 337, 368 (4th Cir. 2001) ("*SBCA*") (finding that the "carry one, carry all" rule regulating the carriage of broadcast signals by satellite television operators did not work a *per se* taking under *Loretto*).

⁵⁵ *See NAB Ex Parte* in CS Docket No. 98-120 at 21 (filed Aug. 5, 2002) (discussing how the cable industry's extraordinarily broad interpretation of *Loretto* and what constitutes a physical taking would bring under attack the leased access provisions and the PEG provisions of the Communications Act, the analog broadcast must carry rules upheld in *Turner*, and a wide array of common carriage requirements).

1465, 1481, 1484 (2002). Under that inquiry, a court “examine[s] ‘a number of factors’ rather than a simple ‘mathematically precise’ formula,” *id.* at 1481, including (1) the “economic impact of the regulation”; (2) the “extent to which the regulation has interfered with distinct investment-backed expectations”; and (3) the “character of the governmental action.” *Penn Central*, 438 U.S. at 124. In evaluating these factors, the analysis focuses on “the parcel as a whole,” rather than just the portion of the property alleged to have been taken. *Tahoe-Sierra*, 122 S.Ct. at 1483-84.

In the context of a cable operator’s entire system, the economic burden imposed by a nondiscriminatory access obligation would not be significant, especially in light of the rapid expansion in cable capacity and the clear ability of cable operators to provide access to multiple ISPs.⁵⁶ Second, any nondiscriminatory access requirements would not interfere with the “distinct investment-backed expectations” of cable operators, but would only represent duties that a reasonable property owner could expect in an industry such as cable, which is regulated at both the national and local levels.⁵⁷ Indeed, obligations resulting in the use of cable operators’

⁵⁶ For example, pursuant to merger conditions, AOL Time Warner is currently offering cable modem service using both affiliated and unaffiliated ISPs. *Notice* at ¶ 26. Moreover, a multiple ISP access obligation would not apply at all, unless the cable operator first of its own accord made a business decision to offer a cable modem service to consumers.

⁵⁷ *See, e.g., General Tel. Co. of the Southwest v. U.S.*, 449 F.2d 846, 864 (5th Cir. 1971) (“The property of regulated industries is held subject to such limitations as may reasonably be imposed upon it in the public interest and the courts have frequently recognized that new rules may abolish or modify pre-existing interests.”); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027-28 (1992) (noting that “in the case of personal property, by reason of the State’s traditionally high degree of control over commercial dealings, [the owner] ought to be aware of the possibility that new regulation might even render his property economically worthless”); *Branch v. U.S.*, 69 F.3d 1571, 1576 (Fed. Cir. 1995) (noting that principles of takings law that apply to real property do not apply in the same manner to statutes imposing monetary liability “[b]ecause of the ‘State’s traditionally high degree of control of commercial dealings’”) (*quoting Lucas*, 505 U.S. at 1027).

capacity (such as carriage requirements) have been a part of cable regulation from the beginning.⁵⁸ Third, the character of the governmental action precludes any argument of a taking under *Penn Central*. As the D.C. Circuit has observed, “the character of the governmental action depends both on whether the government has legitimized a physical occupation of the property, and whether the regulation has a legitimate public purpose.” *District Intown Properties Limited Partnership v. District of Columbia*, 198 F.3d 874, 879 (D.C. Cir. 1999) (internal citations omitted). Here, as shown, there is no “physical invasion” of real property, *Penn Central*, 438 U.S. at 124, and a nondiscriminatory access obligation would, as discussed in detail in these comments, serve a legitimate public purpose. In short, a nondiscriminatory access obligation would simply constitute a regulation “aris[ing] from some public program adjusting the benefits and burdens of economic life to promote the common good,” *id.*, and thus is constitutionally unobjectionable.

For the reasons set forth above, a nondiscriminatory access obligation imposed on cable operators providing cable modem service would constitute neither a physical *per se* taking under *Loretto* or a regulatory taking under *Penn Central*. But even if it could be maintained that an access obligation would result in a taking, no constitutional issue would arise because cable owners would be compensated for the use of their systems’ capacity. As specifically stated by Earthlink, an ISP that supports an access obligation, the FCC is being asked to require cable operators that provide Internet access service to the public for a fee over their own facilities to *sell* the underlying transmission service to unaffiliated ISPs on a nondiscriminatory basis.

Comments of Earthlink at 1-2. If a cable operator receives compensation at a nondiscriminatory

⁵⁸ See, e.g., *U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 166-67 (1968) (mandatory carriage of certain broadcast signals); *U.S. v. Midwest Video Corp.*, 406 U.S. 649, 653-55 (1972) (mandatory origination provisions); 47 U.S.C. § 531(b) (PEG provisions); 47 U.S.C. § 532(b)(1) (leased access provisions).

level for its sale of the use of its capacity, then *a fortiori* a nondiscriminatory access obligation cannot constitute a taking under the Fifth Amendment. *See, e.g., FCC v. Florida Power Corporation*, 480 U.S. 245 (1987) (in review of an FCC order setting the rate that a utility could charge cable television companies using its poles, court found no unconstitutional taking because the rate set by the FCC was not confiscatory); *Verizon Communications, Inc. v. FCC*, 122 S.Ct. 1646 (2002) (because telephone company failed to argue that any particular TELRIC rate was so unjust as to be confiscatory, court found unmeritorious a taking challenge to the FCC's method used to set the rates for the leasing of ILECs' networks to new entrants).⁵⁹

Claims that a nondiscriminatory access obligation would violate the First Amendment rights of cable platform owners must also be rejected.⁶⁰ As an initial matter, NAB notes that the cable industry has a long history of contending that virtually any regulation affecting it has serious First Amendment implications and, as such, must be subjected to significantly heightened judicial scrutiny. For example, the cable industry challenged, on First Amendment grounds, the regulation of the rates it charged consumers because "regulating cable rates inevitably affects both the content and quantity of speech by limiting the amount of money that a cable operator can spend on programming." *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957, 966 (D.C. Cir. 1996). Taken to its logical conclusion, the cable industry's argument would mean that virtually *any* regulation affecting the industry, such as a minimum wage requirement, should be regarded as implicating speech-related concerns and as necessitating heightened First

⁵⁹ And obviously a nondiscrimination standard that only requires cable operators to treat the enhanced interactive content of the unaffiliated video programmers that they carry no less favorably than the interactive content of affiliated video programmers would involve no taking at all, *per se* or regulatory.

⁶⁰ *See, e.g.,* Comments of Cox Communications at 36; AT&T at 20-22; AOL Time Warner at 43-44; Comcast at 18-19.

Amendment scrutiny. After all, if a cable operator is forced by a minimum wage rule to pay higher salaries to some of its employees, then the content and quantity of its speech is limited because the operators will have less money to spend on programming.

The above example illustrates the weakness in the cable industry's position that almost any type of regulation (including competition or economic oriented regulation) affecting it automatically entails serious First Amendment concerns. To the contrary, the Supreme Court has made clear that a regulation is not subject to heightened review merely because it affects a communications-related industry, unless there is "an additional basis for concluding" that such a regulation was adopted for a speech-repressive or other invidious purpose. *Leathers v. Medlock*, 499 U.S. 439, 449 (1991). The regulation of a communications or speech-related industry does not, in fact, raise any issue warranting heightened scrutiny, even if a "differential burden" is placed on different types of media,⁶¹ unless the regulation was actually directed at, or intended to impact, protected speech. *See Leathers*, 499 U.S. at 453 (the "differential taxation of speakers, even members of the press, *does not implicate the First Amendment* unless the tax is directed at, or presents the danger of suppressing, particular ideas") (emphasis added).⁶²

⁶¹ *Leathers*, 499 U.S. at 452 (the extension of an existing sales tax to cable television service, while continuing to exempt print media, held not to violate First Amendment). *See also R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 387-88 (1992) (in examining the constitutionality of a city hate speech ordinance, the court observed that the State could prohibit obscenity "only in certain media or markets" and could "choose to regulate price advertising in one industry but not in others").

⁶² *See also Lorain Journal Co. v. U.S.*, 342 U.S. 143 (1951) (the application of the antitrust laws to a newspaper that attempted to force its advertisers to boycott a competing radio station was held not to violate the First Amendment, even though the newspaper publisher claimed a right to select its customers and to refuse to accept advertisements from whomever it pleased); *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993) (applying only a rational basis review, court upheld a provision of the 1984 Cable Act that had been challenged on Fifth Amendment equal protection grounds because in the "areas of social and economic policy," it was not for the "courts to judge the wisdom, fairness, or logic of legislative choices"); *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 548 (1983) (despite claims that a tax statute

The Commission should accordingly reject the cable industry's underlying assumption that, just because cable is a speech-related industry, then any regulation affecting that industry (including a competition-oriented regulation such as nondiscrimination or access requirements) must automatically be treated as a speech-based restriction meriting raised First Amendment scrutiny. *See, e.g.,* Comments of Cablevision Systems Corp. at 10. Because, as discussed above, the “cable operator’s bottleneck monopoly is a physical and economic barrier” into “subscribers’ homes,” *Time Warner*, 211 F.3d at 3121, NAB urges the Commission to consider any nondiscrimination or access requirement as a competition-related regulation, which is clearly not “directed at, or present[ing] the danger of suppressing, particular ideas,” *Leathers*, 499 U.S. at 453, and which should therefore not receive heightened First Amendment scrutiny.⁶³

In any event, it seems clear that a policy of preventing cable operators from discriminating against (or completely excluding) unaffiliated broadband service and content providers would have less impact on the speech of cable operators than the must carry rules that were upheld in *Turner Broadcasting*, 520 U.S. 180, under an “intermediate” level of review.

treating nonprofit organizations more favorably if they did not engage in substantial lobbying activities affected First Amendment rights on a discriminatory basis, court upheld the statute under a rational basis review, finding “no indication that the statute was intended to suppress any ideas or any demonstration that it has had that effect”).

⁶³ The First Amendment implications of a competition or economic regulation affecting a communications industry were also discussed by the Justices of the Supreme Court in oral argument in cases involving the now-eliminated statutory restrictions (formerly contained in 47 U.S.C. § 533(b)) on local telephone companies providing video programming services to subscribers within their service areas. *See* Transcript of Oral Argument in *U.S., et al. v. Chesapeake and Potomac Telephone Company of Virginia, et al.*; *NCTA v. Bell Atlantic Corp., et al.*, Nos. 94-1893, 94-1900, 1995 U.S. Trans Lexis 107 (Dec. 6, 1995). Several of the Justices questioned departing from “normal rational basis” to a heightened level of First Amendment scrutiny because the restrictions at issue were “classical economic regulation” that “happen[ed] to be economic regulation in an area where people are providing . . . communication services.” Unfortunately, the Supreme Court never issued an opinion in these cases because they were mooted by passage of the 1996 Telecommunications Act, which eliminated the challenged restrictions on telephone companies.

Those rules required most cable systems to set aside up to one-third of their channels for the carriage of local commercial broadcast stations. 47 U.S.C. § 534(b)(1)(B). This set aside requirement “reduce[d] the number of channels over which cable operators exercise[d] unfettered control,” and the cable industry claimed that the requirement also “render[ed] it more difficult for cable programmers to compete for carriage on the limited channels remaining.” *Turner*, 512 U.S. at 636-37. In fact, the cable operators complained in *Turner* that, as a consequence of the broadcast carriage requirements, “some cable programmers who would have secured carriage in the absence of must-carry may now be dropped.” *Id.* at 657. Even in light of these claims, the must carry rules prevailed against a First Amendment challenge.

The must carry rules upheld in the *Turner* cases directly regulated the speech of cable system operators – and were claimed to directly foreclose speech opportunities for some cable programmers – by requiring carriage of particular local broadcasters and their programming. In contrast, nondiscrimination or even access requirements would not force cable operators to carry any particular ISP or any particular content.⁶⁴ There is, moreover, no realistic possibility that cable Internet customers (or anyone else) would associate the messages and opinions contained in the web sites that customers reach through unaffiliated ISPs, or those contained in Internet

⁶⁴ As stated, for example, by Earthlink, a nondiscriminatory access obligation would only require cable operators to allow unaffiliated ISPs access to the cable platform on terms and conditions no less favorable than those given to affiliated ISPs. And under a nondiscrimination standard formulated by some video programmers in the interactive television context, a cable platform owner who has already entered into an agreement to carry the regular video programming of an unaffiliated programming provider would merely be restricted from treating the enhanced interactive content that the unaffiliated programmer transmits with its signal any differently than the platform owner treats the enhanced interactive content of an affiliated programmer. *See* Reply Comments of Non-MVPD Owned Programming Networks in CS Docket No. 01-7 at 17 (filed May 11, 2001).

traffic such as e-mails, with the cable platform owner.⁶⁵ A nondiscriminatory access obligation would therefore present no compelled speech problem. *See Turner*, 512 U.S. at 655 (must carry rules would not “force cable operators to alter their own messages to respond to the broadcast programming they are required to carry”).⁶⁶ Thus, a nondiscriminatory access obligation would clearly have less impact on the speech and speech-related interests of cable operators than the clearly constitutional must carry rules.

Moreover, commenters in this proceeding did not specifically assert (unlike the cable operators in *Turner*) that carriage of multiple ISPs pursuant to a nondiscriminatory access obligation would result in the dropping of other content and services carried by the cable system or in the inability to offer other preferred content and services.⁶⁷ If the carriage of multiple ISPs would not force cable operators to exclude other broadband services or content – especially content such as digital cable programming in which cable operators have a clear speech-related interest – then the First Amendment rights of cable platform owners would be less impacted by a nondiscriminatory access requirement than by the must carry rules (which cable operators at

⁶⁵ Certainly no one has ever suggested that narrowband Internet subscribers associate the content found and accessed via the Internet with the telephone company.

⁶⁶ Some commentators believe it much more likely that cable operators would be associated with the content of the broadcast television programming they carry than with the Internet content made available via a cable operator’s modem service. Wolitz, *Open Access* at ¶¶ 33, 44. And if the Supreme Court upheld the broadcast must carry rules against a compelled speech claim, then a nondiscriminatory open access obligation would raise no serious compelled speech questions.

⁶⁷ Cable operators did discuss the technical and operational challenges presented by providing multiple ISP services. *See, e.g.*, Declaration of Susan K. Marshall at 4, attached to Comments of AT&T. NCTA also generally stated that “there is a limit to the number of ISPs that can be accommodated by a single cable operator,” apparently primarily due to technical challenges in routing data between customers and their chosen ISPs. Comments of NCTA at 20. NCTA, however, raised no constitutional objections to a multiple ISP access obligation, and less intrusive nondiscrimination standards would obviously present even fewer constitutional issues.

least claimed to have caused the dropping of cable programmers from cable systems).

Nondiscrimination or access requirements that will not significantly affect the ability of cable operators to carry whatever broadband services and content they may choose can raise no serious constitutional questions. *See SBCA*, 275 F.3d at 353 (concluding that the “carry one, carry all” rule did not violate the First Amendment rights of satellite carriers, and emphasizing that “some of the speech interests present in *Turner*” were “absent” in this case because satellite carriers did *not* claim that the “carry one, carry all” rule would “force them to drop national or regional non-broadcast programmers in order to carry more local broadcasters”).

To the extent that one commenter contended that its choice to devote additional capacity to other *businesses* – rather than to cable *programming* – could be adversely affected by an obligation to accommodate multiple ISPs, then no First Amendment interest recognized by the Supreme Court in *Turner* is even implicated.⁶⁸ Carriage of telephone or Internet traffic by its nature does not require, or indeed allow, the choice of specific content by a cable operator. Instead, the content of a telephone call or e-mail message or the choice of which web sites to visit is determined by the customer. Even with a service such as video-on-demand (which is, at least, programming-related), the choice of the specific content of that programming is left to the

⁶⁸ Cox Communications argued that the government cannot simply require cable operators to allocate additional spectrum to cable modem service so as to accommodate *additional* ISPs (beyond the affiliated or favored ISP that Cox wishes to carry) because there is no “spare room” on cable networks, given the deployment of other services, including voice/telephony, data and video-on-demand that are bandwidth-hungry services. Comments of Cox at 26. This commenter did not, however, argue that a multiple ISP access obligation violated the First Amendment because it would, due to a capacity shortage, cause the exclusion of other preferred content. *See* Comments of Cox at 36 (in making a constitutional claim, commenter only asserted that cable operators were entitled to full First Amendment protection and that a right of access against a “fully-protected speaker cannot survive”).

customer, and the cable operator has no real editorial function.⁶⁹ Thus, if a cable operator chooses to devote capacity to voice or other services over which it exercises no “editorial discretion,” *Turner*, 512 U.S. at 636, that is simply a business decision on its part. In that situation, if a capacity constraint results and the cable operator chooses not to carry certain cable programming, it is a capacity constraint of the individual cable operator’s own making. It is the cable operator’s business choice to offer these various other services – and not the nondiscriminatory access obligation – that results in any displacement of cable programming in which the cable operator has a speech-related interest. A cable operator in this position is thus no different, from a First Amendment perspective, from a cable operator with sufficient capacity to meet all nondiscrimination or other regulatory requirements while still carrying all the cable programming the operators wishes – in other words, a cable operator with no First Amendment claim at all.

In sum, no serious First Amendment concerns are raised by the nondiscrimination or access requirements that the Commission may consider. As the Supreme Court has emphasized, the First Amendment does not “disable” the government from ensuring that cable system operators do “not restrict, through physical control of a critical pathway of communication, the free flow of information” into subscribers’ homes. *Turner*, 512 U.S. at 657.

⁶⁹ The Supreme Court has emphasized that cable entities’ protected First Amendment interests center on their provision of “original *programming*” or their exercise of “*editorial discretion* over which *stations or programs* to include in [their] repertoire.” *Turner*, 512 U.S. at 636 (emphasis added).

VI. Conclusion.

For all the reasons set forth above, NAB urges the Commission to prevent the owners of bottleneck distribution facilities from exercising their control of the “essential pathway” into consumers’ homes to “silence the voice of competing speakers” in the broadband marketplace. *Turner*, 512 U.S. at 656. Regardless of the regulatory label ultimately attached to high speed Internet access services provided over cable modems, the Commission must ensure that (1) unaffiliated service and content providers are able to reach consumers without unreasonable disruptions and encumbrances; and (2) consumers have meaningful choices among competing services and content in the broadband environment. Allowing gatekeeper platform owners to monopolize or duopolize the broadband marketplace by controlling access to consumers will not promote these goals, but will result in an uncompetitive market characterized by a lack of innovation and constricted consumer choices.

NAB emphasizes that no commenter in this proceeding has presented a convincing rationale for departing from the regulatory principles of openness and nondiscrimination that have kept the narrowband Internet marketplace competitive, innovative and devoid of entry barriers. Indeed, the record in this and related proceedings clearly demonstrates the technical ability of platform owners to delay, degrade or block any unaffiliated or other disfavored services and content, as well as the natural “incentive” of any platform owner “to favor its affiliated” services and content at the expense of “the consumers’ interests.” *Time Warner Entertainment*, 211 F.3d at 1322. Opponents of nondiscrimination standards have, moreover, failed to show that such requirements raise any serious constitutional questions. NAB therefore urges the Commission to retain the regulatory policies that have been consistently applied in the

narrowband Internet marketplace, and apply those nondiscrimination requirements to high speed Internet access services provided over cable modems.

Respectively submitted,

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A handwritten signature in cursive script, reading "Jerianne Timmerman".

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